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IN THE
COURT OF APPEALS OF INDIANA

LESTER JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0605-CR-403
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0511-FB-60

April 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Lester Jones appeals his convictions for Criminal Recklessness,[1] a class D felony, Residential Entry,[2] a class D felony, Intimidation,[3] a class A misdemeanor, and the finding that he was a Habitual Offender.[4] Specifically, Jones argues that the jury was improperly instructed on a lesser-included offense of intimidation when a higher class of that offense was actually charged, that his trial counsel was ineffective, that the evidence was insufficient to support the convictions, and that he was improperly sentenced. Finding no error, we affirm the judgment of the trial court.

FACTS

On November 25, 2005, Jones and a friend, Jesse Hawkins, were using crack cocaine in Hawkins's Lafayette apartment. The entrance to Hawkins's apartment was on the main floor near the entrance to the apartment building. The living area of Hawkins's apartment was located up one flight of stairs that was directly behind the front door of his apartment, which was on the main floor. Tammy Lechner and her daughter, Sausha, lived in an apartment on the main floor of the building.

At some point, Jones left Hawkins's apartment, but he returned later that evening. Sausha, who was asleep in her mother's apartment, was awakened by Jones's knock at the front door of the apartment building. When Sausha opened the door, she recognized Jones because she had met him on a prior occasion. Jones was carrying a stick and entered the

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[1] Ind. Code § 35-42-2-2.

[2] Ind. Code § 35-43-2-1.5.

[3] Ind. Code § 35-45-2-1.

apartment building. Jones became angry and asked, "Where is my God damn wallet?" Tr. p. 102, 251. Jones pointed the stick at Shauna, shook it, and asked her for drugs. Jones then threatened to hurt Shauna if she did not give him either drugs or his wallet.

Hawkins, who had fallen asleep, was awakened by Jones's "hollerin[g]," "yelling," and "arguing." Id. at 47-48, 61-62, 66. Hawkins called the police because he feared that Jones might injure someone. Thereafter, Hawkins and Jones engaged in a verbal confrontation. Although Hawkins tried to shut his front door, Jones pushed him out of the way and followed Sausha inside. Jones then shut Hawkins out of the apartment and locked the door. Jones proceeded to grab Sausha by the throat and continued to yell at her while Hawkins waited outside for the police. When the police arrived, Jones permitted Sausha to open the door. Once the officers were inside, they arrested Jones.

As a result of the incident, the State charged Jones with criminal confinement, intimidation, two counts of residential entry, and criminal recklessness. Jones was also alleged to be a habitual offender. Prior to the presentation of evidence at Jones's jury trial that commenced on February 9, 2006, the prosecutor informed the trial court that there might be a dispute about certain testimony as to whether Jones and Hawkins were using cocaine together prior to the arrest. The prosecutor advised the trial court that he would only ask Hawkins on direct examination whether Jones was at his apartment earlier in the evening.

During the State's case-in-chief, the prosecutor called Hawkins to the witness stand and did not inquire about the activities in which Jones and Hawkins were engaging while

Jones was in the apartment. However, on cross-examination, Jones's counsel questioned Hawkins regarding the use immunity that he had obtained from the State in exchange for his testimony against Jones, and asked the following:

Q: What were you all doing earlier when Lester was there?

A: Visiting.

Q: And what kind of activities were you engaged in when you were visiting?

A: Sittin[g], talking.

Q: What else?

A: Smokin[g].

Q: Smoking what?

A: Smoking crack.

Id. at 59. Jones's counsel continued to question Hawkins about the crack cocaine and "how [Hawkins] did [his] crack that night." Id. at 60. Defense counsel was then able to verify through Hawkins that the use immunity pertained to pending charges based upon the drugs and paraphernalia that were seized from Hawkins's apartment. Jones's counsel questioned Hawkins about his statements to the police where he claimed that Jones may have planted the drugs in the apartment. He also questioned Hawkins about his prior testimony that both he and Jones were using drugs and, if that were true, Jones would not have had any motivation to plant drugs in Hawkins's apartment. Hawkins responded that Jones had brought the drugs to the apartment. Jones's counsel also asked Hawkins if he had lied to the police and, on re-

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[4] Ind. Code § 35-50-2-8.

direct examination, the State asked Hawkins whether both he and Jones had been using drugs. Hawkins acknowledged that they both had used drugs that evening.

Jones testified on direct examination that he was in Hawkins's apartment earlier in the evening and that he had used marijuana and consumed alcohol. Jones further acknowledged that he, Hawkins, and others had engaged in gambling and, during the course of the night, he had won both money and "dope." Id. at 248. On cross-examination, the State questioned Jones about his drug use that night. Jones acknowledged that he had smoked marijuana but denied using cocaine. After the State asked Jones whether everyone else had used cocaine that evening, Jones responded that he had "never smoked crack in [his] life." Id. at 261. The prosecutor then asked Jones whether he had ever been arrested and convicted for possession of cocaine and Jones acknowledged that he had. The State questioned Jones about the class of felony with which he was originally charged, and Jones's counsel objected on relevancy grounds. The trial court overruled the objection, and on re-direct examination, Jones explained the circumstances of his prior conviction for possession of cocaine and that it did not involve his use of cocaine.

Following the presentation of evidence, the trial court engaged in discussions with the prosecutor and Jones's counsel as to whether the jury should be instructed on a lesser class offense of intimidation. Specifically, the State requested the trial court to instruct the jury on the lesser-included offense but Jones objected because the State did not allege the lesser-included offense in the charging information. The trial court overruled Jones's objection and

instructed the jury on intimidation as a class A misdemeanor, a class D felony, and a class C felony.

At the conclusion of the trial, Jones was found guilty of Count II, intimidation as a class A misdemeanor; Count IV, residential entry as a class D felony; and Count V, criminal recklessness as a class D felony. Jones was also found to be a habitual offender. The trial court sentenced Jones to an aggregate term of eight and one-half years of imprisonment as follows: Count II, one year; Count IV, three years; and Count V, three years. Jones was ordered to serve the sentences on Counts IV and V concurrently, with the sentence on Count II to be served consecutively to the sentences imposed on Counts IV and V. The trial court also enhanced the sentence in Count II by four and one-half years as the result of the habitual offender finding. Jones now appeals.

DISCUSSION AND DECISION

I. Ineffective Assistance of Counsel

Jones contends that his convictions must be reversed because his trial counsel was ineffective. Specifically, Jones argues that his trial counsel was ineffective for failing to object to the State's questions and answers about Jones's prior arrest and conviction for cocaine possession. Because the jury heard this prejudicial evidence, Jones argues that he is entitled to a new trial.

Our standard of review when evaluating claims of ineffective assistance of counsel is well settled. To prevail, a defendant must establish the two elements set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, the petitioner must show that counsel's

performance was deficient. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). To establish this element, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the Sixth Amendment right to counsel. Id. We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions. Id. Moreover, this court has recognized that "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003). To establish ineffective assistance for counsel's failure to object, a defendant must show that the trial court would have sustained the objection had one been made and that he or she was prejudiced by the failure to object. Wrinkles v. State, 749 N.E.2d 1179, 1192 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002).

Under the second prong of the test, the petitioner must demonstrate prejudice; that is, he must demonstrate a reasonable probability that the result of the trial would have been different if counsel had not made the errors. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002). If our confidence that the result would have been the same is undermined, we will find that a reasonable probability exists. Id. Also, if we can dismiss an ineffective assistance of counsel claim based on lack of prejudice, we need not address whether counsel provided deficient performance. Id.

In this case, it is apparent that Jones's counsel sought to impeach Hawkins's credibility. In exposing the issue of Hawkins's drug use to the jury, testimony was also elicited regarding Jones's cocaine use because Hawkins testified that Jones brought cocaine

to the apartment and that they both used the drug on the evening of February 25, 2005. Tr. p. 59, 78. Jones also chose to testify on his own behalf, and he admitted to smoking marijuana and possessing cocaine during the course of the evening. Id. at 243, 248. Hence, the State could properly question Jones about his involvement with drugs on the evening of November 25, 2005, in light of the prior questioning and Jones's own testimony.

Given these circumstances, the jury could certainly conclude that Hawkins was not to be believed and that Jones was credible despite his involvement in drugs. It is apparent that Jones's counsel was attempting to demonstrate that Hawkins would say anything to avoid responsibility for his criminal actions, including reporting to the police and testifying before a jury that Jones was the individual to blame. Additionally, Jones was also able to establish through his testimony that Hawkins operated a "crack" house and people knew that they could buy drugs, sex, and gamble in the apartment. Id. at 241. Hence, Jones's counsel's decision to question Hawkins in an attempt to impeach his credibility was strategic and reasonable. Thus, it cannot be said that he was ineffective for doing so.

That said, it was also proper for the State to question Jones about his prior conviction for possessing cocaine because Jones testified that he had never used cocaine before in his life. Id. at 261. This court has observed that evidence that is otherwise inadmissible may become admissible when the defendant opens the door to questioning on that evidence. Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004). In order to open the door, "the evidence relied upon must leave the trier of fact with a false or misleading impression of the facts related." Id. Here, Jones's testimony that he had never been involved in cocaine usage

before the evening of February 25, 2005, left the jury with a false impression. Thus, it was appropriate for the State to inform the jury that Jones had been convicted on a prior occasion for possession of cocaine. Furthermore, Jones was afforded an opportunity to explain the circumstances surrounding the prior conviction, and he has failed to show that an objection to this testimony made by his trial counsel would have been sustained. For these reasons, Jones has failed to show that his trial counsel rendered deficient performance and, therefore, his ineffective assistance claim fails.

II. Sufficiency of the Evidence

Jones claims that the evidence was insufficient to support his convictions for criminal recklessness and residential entry. Specifically, Jones argues that the conviction for criminal recklessness must be set aside because the State failed to prove that his conduct created a substantial risk of harm to Sausha. Jones also contends that the conviction for residential entry must be vacated because the evidence only established that he "walked through an open door" when entering Hawkins's apartment. Appellant's Br. p. 11.

A. Standard of Review

When reviewing challenges to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). Rather, we will examine the evidence and the reasonable inferences that may be drawn therefrom that support the verdict and will affirm a conviction if there is probative evidence based on which a jury could find the defendant guilty beyond a reasonable doubt. Id. Put another way, we will affirm unless "no rational fact-finder" could have found the

defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000).

B. Criminal Recklessness

In relevant part, Indiana Code section 35-42-2-2 provides that criminal recklessness as a class B misdemeanor is committed when a person who recklessly, knowingly, or intentionally performs: (1) an act that creates a substantial risk of bodily injury to another person. However, the offense is a class D felony if the person commits the offense "while armed with a deadly weapon." I.C. § 35-42-2-2(c)(2)(A).

In this case, the evidence showed that Jones held, pointed, and shook a stick at Sausha. Tr. p. 101, 117. Jones was angry and was pointing the stick at Sausha while yelling and threatening to injure her. Id. at 50-51, 53, 63, 65, 102-04, 107, 128, 130-31, 251. After Jones locked Hawkins out of the apartment, he continued to follow Sausha while holding the stick. Id. at 50, 53, 67, 109, 180. Jones also cornered Sausha, grabbed her by the throat, threatened to hurt her, and shook the stick at her. Id. 109-10, 116, 118, 128, 189-90, 253, 305-06. In short, Jones's act of arming himself with the stick, shaking it, and pointing it at Sausha created a risk of bodily injury to Sausha. Thus, we conclude that the evidence was sufficient to support Jones's conviction for criminal recklessness as a class D felony. See D.B. v. State, 658 N.E.2d 595, 595-96 (Ind. 1995) (observing that even an unloaded firearm can create a substantial risk of bodily injury because brandishing a gun during a dispute can create a variety of risks of bodily injury to others regardless of whether the weapon is loaded).

C. Residential Entry

Indiana Code section 35-43-2-1.5 provides that "[a] person who knowingly or intentionally breaks and enters the dwelling of another person commits residential entry, a Class D felony." In this case, Jones argues that the evidence presented at trial failed to satisfy the required element of "breaking." Appellant's Br. p. 11.

In resolving this issue, we note that the use of the slightest force in pushing aside a door to enter constitutes a breaking and entering. McKinney v. State, 653 N.E.2d 115, 117 (Ind. Ct. App. 1995). The evidence in this case established that when Hawkins returned to the main floor of the apartment, he and Jones engaged in a verbal confrontation. Tr. p. 104, 251. Hawkins stood in his front doorway and attempted to shut the door, but Jones pushed Hawkins out of the way and followed Sausha inside. Id. at 50, 52, 66-69, 108, 127, 252. Jones then shut Hawkins out of the apartment and locked the door. Id. at 50, 53, 67, 109, 180. Under these circumstances, Jones's act of pushing Hawkins out of the way as he tried to shut the door was sufficient to show a breaking. See McKinney, 653 N.E.2d at 118 (holding that the evidence was sufficient to show a breaking when the defendant pushed the door open and walked in as the victim was closing his door). As a result, we conclude that the evidence was sufficient to support Jones's conviction for residential entry.

III. Jury Instructions

Jones next claims that he is entitled to a reversal because the jury was improperly instructed. In essence, Jones contends that the trial court erred in instructing the jury that he could be found guilty of intimidation as a class A misdemeanor or a class D felony when he

had only been charged with committing that offense as a class C felony. Jones asserts that instructing the jury on the lesser offenses afforded the State several "bites of the apple in an effort to obtain a conviction or compromise verdict." Appellant's Br. p. 18.

We initially observe that instructing the jury is within the trial court's sound discretion and will not be disturbed absent an abuse of that discretion. Womack v. State, 738 N.E.2d 320, 325 (Ind. Ct. App. 2000). In determining whether a tendered instruction was properly given, this court considers: 1) whether the instruction is a correct statement of the law; 2) whether there is evidence to support the giving of the instruction; and 3) whether the substance of the instruction is covered by other instructions. Clark v. State, 728 N.E.2d 880, 884 (Ind. Ct. App. 2000). Also, we note that a party is entitled to an instruction on a lesser-included offense when: 1) the lesser offense is either inherently or factually included within the charged crime; and 2) there is a "serious evidentiary dispute" about the element that distinguishes the greater from the lesser offense. Young v. State, 699 N.E.2d 252, 255 (Ind. 1998) (citing Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995)). Moreover, the trial court should give a properly tendered lesser-included offense instruction where the evidentiary dispute is such that the jury could conclude that the lesser offense was committed but not the greater. Wright, 658 N.E.2d at 566. Finally, the trial court should instruct a jury on a lesser-included offense regardless of which party requests and/or objects to a lesser-included offense instruction if the instruction is proper under the test set forth in Wright. See Young, 699 N.E.2d at 255.

As noted above, Jones was charged with intimidation as a class C felony, and the trial court's instruction to the jury on that charge mirrored the language of the statute. The instruction also indicated that intimidation was a class A misdemeanor, but the charge could be elevated to a class D felony if a forcible felony was threatened or to a class C felony if it was established that Jones drew or used a deadly weapon. Appellant's App. p. 439. Because the additional element of "drew or used a deadly weapon" is all that distinguishes class C felony intimidation from the class A misdemeanor, Jones certainly had notice of the lesser-included offense and was not prejudiced by the instruction. See Davenport v. State, 536 N.E.2d 263 (Ind. 1989) (holding that the defendant's due process rights were not violated where the jury returned a verdict on an inherently lesser-included offense of conspiracy to commit robbery as a class C felony rather than as it was charged as a class B felony where the only difference between the classes of the offense was if the defendant was armed with a deadly weapon). Because the State requested the instruction on a lesser-included offense and Jones was convicted of a lesser-included offense that was inherent in the crime that was charged, Jones's claim fails.

IV. Sentencing

Finally, Jones argues that he was improperly sentenced. Specifically, Jones maintains that the eight-and-one-half-year aggregate sentence "was excessive given the facts about [his] case." Appellant's Br. p. 19.

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the court finds

that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(b). Under this rule, we have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). We are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct a Rule 7(B) review. See Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same).

As noted above, Jones was found guilty of two class D felonies and one class A misdemeanor. Pursuant to Indiana Code section 35-50-2-7, the sentencing range for a class D felony is six months to three years, with an advisory sentence of one and one-half years. Indiana Code section 35-50-3-2 provides that "a person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year."

When examining the nature of the offense, the record shows that Jones committed criminal acts against two victims—Sausha and Hawkins. Indeed, the trial court could have ordered Jones's sentences on the two class D felonies to run consecutively. See Hampton v. State, 553 N.E.2d 132, 137 (Ind. 1990) (holding that the commission of and convictions for separate, multiple crimes is a valid indicator of the appropriateness of an enhanced sentence). However, the trial court chose to order those sentences to be served concurrently, and it also ordered the sentence on the class A misdemeanor to run consecutively to the sentence imposed on the class D felonies. Thus, the enhanced and consecutive sentences appropriately

recognized that there were multiple criminal transgressions against multiple victims.

Also, the evidence showed that Jones threatened Sausha while yelling and pointing a stick at her. He continued to pursue Sausha into Hawkins's apartment despite Hawkins's attempt to stop Jones. Tr. p. 50, 52-523, 66-69, 108-09, 127, 180, 252. And Jones did not stop until the police arrived. Id. at 110-11, 182, 253. When examining the nature of the offenses that Jones committed, we cannot say that the length of the sentence imposed was inappropriate.

With regard to Jones's character, the record shows a significant criminal history that began when he was a juvenile. In 1978, Jones was adjudged a delinquent for what would have been criminal conversion had that offense been committed by an adult. He was also found to be a juvenile delinquent in 1982 for five counts of burglary had an adult committed those offenses. Appellant's App. p. 538-39. Jones's adult criminal history includes four felony convictions and twenty-one misdemeanor convictions that include—to name but a few—public intoxication, trespass, disorderly conduct, battery, possession of marijuana, resisting law enforcement, intimidation, and bail jumping. Despite Jones's numerous involvements with the criminal justice system and the numerous attempts at rehabilitation, Jones continues to commit crimes. Simply put, Jones's criminal history is significant, it reflects poorly on his character, and it demonstrates a continuous and complete disregard for the law.

In addition, Jones admitted that he attempted to dissuade Sausha from testifying against him. Specifically, the record shows that he wrote a letter to Sausha's mother

apologizing for his behavior and offering to buy her some cocaine in exchange for Sausha's cooperation in avoiding subpoenas and in refusing to testify. Tr. p. 311-12, 314. In essence, Jones's attempt to prevent a witness from testifying reflects poorly on his character and further demonstrates his disrespect for the law. Therefore, when considering the nature of the offenses and Jones's character, we cannot say that the eight and one-half year aggregate sentence was inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.